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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 435

GRADY L. WEST and CLIFFORD C. GRAHAM,

Petitioners,

—against—

EDWARD M. GILBERT, E. L. BRUCE CO., INCORPORATED, CORALOC INDUSTRIES, INC., WILLIAM A. FIO RITO, ISRAEL G. SEEGER, and VINCENT D'SUSA,

Respondents.

BRIEF ON BEHALF OF RESPONDENT D'SUSA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

The only observation this respondent wants to make to the manner in which the petitioners phrase the questions presented is that nowhere does it appear that the order of dismissal affirmed by the Circuit Court of Appeals was by its terms "without prejudice". [See Appendix B, page 62 of petition] There is little doubt that once this case was dismissed "without prejudice" for failure to prosecute the same, petitioners had the right to reinstitute the action.

They still do. Instead they chose to make two motions to set aside the order of dismissal and when both motions were denied, they chose to appeal the same to the Circuit Court of Appeals, and when that court affirmed the order of the District Court, they chose to petition this Court for certiorari.

Accordingly, this is not the kind of controversy that should result in the Court's granting certiorari.

Statement

Rule 40 of the Rules of this Court and more specifically subdivision (e) thereof asks that

> "a concise statement of the case containing all that is material to the consideration of the questions presented"

should be made. Petitioners have taken seven pages for this "concise" statement.

The argument of the petitioners consumes fifty-one (51) pages all but four of which deal with the "facts" as alleged by the petitioners. Nowhere does there appear a summary of argument as subdivision (f) of Rule 40 requires.

Reasons for Denying the Writ

1. Rule 19 of this Court [Considerations governing review on certiorari] states that a review on writ of certiorari is not a matter of right and will be granted only when there are special and important reasons therefor. As a measure of the exercise of this Court's "sound judicial dis-

cretion", criteria are set down which, the rule states, "indicate the character of reasons which will be considered."

Petitioners contend that the Court of Appeals in affirming the decision of the Southern District of New York has come into conflict with an applicable decision of this Court, to wit *Surowitz, etc.* v. *Hilton Hotels Corporation,* 383 U.S. 363. This is their prime basis for this application.

In setting forth their arguments, petitioners on page 10 of their petition state:

> "Petitioner in Surowitz, *like petitioners here,* was a minority stockholder . . . The complaint, *like the complaint here,* was verified . . ." (Emphasis added)

It is respectfully submitted that the similarity ends right there; that these two similarities are insubstantial, have no bearing on this case, and that thousands of cases share these similarities, which are irrelevant to this petition.

In view of the strained attempts on the part of the petitioners to liken the *Surowitz* case to this case so as to say that the Second Circuit failed to follow an "applicable decision" of this Court, it is necessary to show all of the dissimilarities and distinguishing factors that exist between the *Surowitz* case and this case.

(a) The *Surowitz* case was a stockholders' derivative action brought on behalf of plaintiff and other stockholders of the corporation alleging that officers and directors of the corporation had defrauded it of several million dollars. Our Petitioners, while minority stockholders of a corporation, were the original stockholders who formed the corporation and who, with others, sold stock to the public.

The main thrust of their argument is that they accepted approximately $50,000 for their stock while other selling stockholders [Fio Rito and Seeger] secretly and in conspiracy with the buyer [E. L. Bruce Co. Incorporated] and in conspiracy with an employee of the buyer [D'Susa], received a larger price.

(b) In the *Surowitz* case, Mrs. Surowitz did not understand the complaint, could not explain the statements contained therein, had little, if any knowledge what the lawsuit was about, and did not know of the nature of the defendants' misconduct. She in fact verified the complaint in reliance upon what her son-in-law told her about the facts in the case. The District Court for the Northern District of Illinois on motion by defendants and before issue was joined, dismissed the complaint. The Circuit Court of Appeals for the Seventh Circuit affirmed the dismissal, on the ground that Mrs. Surowitz' verification of the Complaint was false because she swore to facts of which she was wholly ignorant, resulting in the pleading being a sham pleading.

This Court reversed and in so doing stated:

> "Mrs. Surowitz, the plaintiff and petitioner here, is a Polish immigrant with a very limited English vocabulary and practically no formal education. For many years she had worked as a seamstress in New York where, by reason of frugality she saved enough money to buy some thousands of dollars worth of stock. She was of course not able to select stocks for herself with any degree of assurance of their value. Under these circumstances she had to receive advice and counsel and naturally she went to her son-in-law, Irving Brilliant. Mr. Brilliant had graduated

> from the Harvard Law School, possessed a degree in economics from Columbia University, was a professional investment adviser and in addition to his degrees and his financial acumen wore a Phi Beta Kappa key."

It was this same son-in-law that purchased Hilton Hotels Corporation stock for his mother-in-law, using her own money for it. Thereafter Mrs. Surowitz received in the mail a notice from Hilton Hotels Corporation announcing a plan to purchase a large amount of its own stock. She took the notice to her son-in-law to have it explained to her. He, disturbed by the notice, immediately set out to make an investigation. As a result of his investigation he and an associate reached the conclusion that something had to be done. Thereafter the complaint was filed. Mrs. Surowitz agreed that it be filed in her name. It was prepared by the associate of her son-in-law; it was read and explained to her by her son-in-law after which she verified it.

The Court stated:

> "Her limited education and her small knowledge about any of the English language, except the most ordinarily used words, probably is sufficient guarantee that the courts below were right in finding that she did not understand any of the legal relationships or comprehend any of the business transactions described in the complaint. She did know, however, that she had put over $2,000 of her hard earned money into Hilton Hotels' stock, that she was not getting her dividends, and that her son-in-law who had looked into the matter thought that something was wrong. She also knew that her son-in-law was qualified to help her and she trusted him . . . Mrs. Surowitz verified the complaint, not on the basis of

> her own knowledge and understanding, but in the faith that her son-in-law had correctly advised her that the statements in the complaint were either true or to the best of his knowledge he believed them to be true."

This Court then went on to state in discussing Federal Rule 23(b) that it

> "was not written in order to bar derivative suits. Unquestionably it was originally adopted and has served since in part as a means to discourage 'strike suits' by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them . . .
>
> When the record of this case is reviewed in the light of the purpose of Rule 23(b)'s verification requirement, there emerges the plain, inescapable fact that this is not a strike suit or anything akin to it."

This Court then went on to state:

> "We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like these . . ."

Unlike the *Surowitz* case, in this case there have been answers, there has been argument, and this is not a case of a stockholders' derivative suit.

In closing, this Court went on to state:

> "It has now been practically three years since the complaint was filed and as yet not one of the defendants has even been compelled to admit or deny the wrongdoings charged. They should be."

Compare that statement with this case, where it is now over four years since the complaint has been filed and where all of the respondents have answered and have denied the wrongdoings charged. In fact this case was three and one-half years old by the time petitioners' original motion for relief under Rule 60(b)(6) was made.

2. Not only isn't this case in conflict with an "applicable decision" of this Court, on the contrary it is consistent and in fact follows an "applicable decision" of this Court.

In the case of *Link* v. *Wabash Railroad Company,* 370 U.S. 626, this Court decided in 1962 a controversy similar to the one presented now. This Court affirmed the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed by a divided vote an order of the United States District Court for the Northern District of Indiana which dismissed that action for failure of the plaintiff to prosecute the same. Certiorari was granted after which this Court upheld the power of the District Court to dismiss an action where the plaintiff's attorney failed to appear at a pre-trial conference.

It should be stated at this point that in this case the dismissal was *without* prejudice and the action could then and still be started anew.

In the *Link* case the District Court dismissed *with* prejudice and that dismissal was upheld by this Court. In doing so this Court stated as follows:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of

pending cases and to avoid congestion in the calendars of the District Courts.

* * * * * *

Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that 'the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.' *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 246; 64 S. Ct. 599, 606; 88 L. Ed. 692. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

* * * * * *

Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissable range of the court's discretion."

3. Certiorari should be denied for the reason that, with respect to this respondent, no merit of any claim has ever been shown.

It is no coincidence that D'Susa's name is really DeSousa and that he is the last named defendant. The manner in which he is referred to in the appendix to the appellants' brief in the Court of Appeals illustrates that as a defendant he was purely an added starter. In petitioners' counsel's "affidavit of merits" (Appx. 7a) this respondent was named three times and a few other times was referred to as "one of the defendants". The first time he was mentioned (Appx. 8a), he was in a merely formal way referred to as an officer of the two corporate respondents.

The next time this respondent was mentioned (Appx. 10a) was as follows:

> "The *gist of this fraud* centered on the *pressure put on plaintiffs* by defendants Fio Rito, Seeger and D'Susa to sell their securities 'or else' at $5 for a total of $51,000 on such date." (Emphasis added)

This is the first time this respondent was charged with a wrong, to wit *putting pressure on the plaintiffs.* It is submitted that "putting pressure" on a seller to consummate a sale is an inadequate allegation of fraud.

Petitioners would be the first to admit that what they sold was not sold to this respondent; that this respondent was not part of an insider group; that this respondent did not realize a profit; that this respondent was in no fiduciary relation with the petitioners and that when the petitioners executed general releases, they ran to all of the respondents except this respondent.

A careful reading of the petitioners' references to this respondent would lead one to believe that the gravamen of his "wrong" was that he issued ultimata, was antagonistic, dictatorial and on occasions, was rude.

On the question of lack of merit regarding all of the respondents, this Court's attention is directed to Appendix B annexed to the petition which is District Judge Weinfeld's opinion denying a preliminary injunction. Judge Weinfeld stated:

> "In order to prevail in this motion, there must be a showing of a meritorious claim, a probable likelihood of success and an equitable basis for the exercise of the Court's equity power. While there is some evidential support for plaintiff's claim, there is sufficient countervailing evidence so that upon the papers here presented *a strong probability of plaintiffs' success does not clearly emerge.*" (Emphasis added)

4. Petitioners' failure to diligently prosecute their action for three and one-half years affords an ample basis for the District Court's refusal to vacate the order of dismissal in this case.

Petitioners do not question the District Courts' inherent power to insist upon diligent prosecution of cases or their power to impose penalties for failure to so do.

Rule 60(b) of the Federal Rules of Civil Procedure provide in part as follows:

> "On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . ."

Subdivision 1 of the foregoing rule was not available to petitioners since more than one year had elapsed between the date of the order of dismissal and the motion to vacate the same. For this reason petitioners relied upon subdivision 6.

Professor Moore in *7 Moore's Federal Practice* has considered the propriety of a motion based upon Rule 60(b)(6), where more than one year has elapsed between the order of dismissal and the date of the motion to vacate and set aside the same. He states the following at page 310:

> "Since relief from a judgment on the ground of mistake, inadvertence, surprise, or excusable neglect must be sought not later than a year, relief from a default judgment for want of appearance, where valid jurisdiction over the defendant has been obtained can be justified after the year period only under *extraordinary* circumstances. Whether the party has moved for relief within a reasonable time must be determined in the light of those *extraordinary* circumstances" . . . (Emphasis added)

Professor Moore has also considered the criteria to be used by a District Court Judge in construing Rule 60(b)(6) to determine if the extraordinary circumstances are present. On page 309 he states:

> "Speaking generally, clause (6) is a reservoir of equitable power to do justice in a particular case for any reason, not comprehended in the preceding clauses (1)-(5), that justifies relief. If the motion for relief is based on 'any other reason' so that the District Court has the power to grant relief under Clause (6), *the grant or denial of the motion involves the exercise of a sound legal discretion by the District Court, which will be disturbed by an appel-*

> *late court only for abuse.* Whether the motion was made within a reasonable time is one of the factors to be considered by the District Court." . . . (Emphasis added)

It is Professor Moore's view that the District Court's determination of whether *extraordinary* circumstances exist is discretionary and that such discretion should not be interfered with on appeal except where there is a clear abuse of discretion.

In the case of *Link* v. *Wabash Railroad Company, supra,* this Court agreed with Professor Moore's reasoning, and in that case involving a dismissal for failure to prosecute, held as follows:

> "Whether such an order [of dismissal for failure to prosecute] can stand on appeal depends not on power, but on whether it was in the permissable range of the Court's discretion."

In the case of *Demeulenaere* v. *Rockwell Manufacturing Company,* 312 F. 2d 209 (1962), cert. denied, 374 U.S. 813 (1962), this Court denied certiorari in a case where the plaintiff sought relief from a dismissal based upon its failure to prosecute. The Second Circuit stated:

> "If we are ever to bring the dockets of our trial courts up-to-date and current, the dead wood that has accumulated over the years must be cleared away. This is particularly true of allegedly massive and complicated claims such as the one before us, involving on paper huge sums but, so far as has been disclosed after many years of backing and filling, wholly devoid of merit . . ."

The Court is also respectfully referred to the following two additional cases which concern themselves with the dis-

cretionary power of the District Court in a case such as this:

> *Cucurillo* v. *Schulte, Bruns Schiff Geselschaft M. B. H.*, 324 F. 2d 234 (9 Cir. 1963);
> *Nederlandsche Handel-Maatschappij N.V.* v. *Jay Emm, Inc.*, 301 F. 2d 114 (2 Cir. 1962).

In *Nederlandsche, supra,* the Circuit Court of Appeals for the Second Circuit stated:

> "Moreover, since relief under Rule 60(b) is essentially discretionary, we would be loath to substitute our judgment for that of the trial judge. *Atchison T. & S. F. Ry.* v. *Barrett,* 246 F. 2d 846 (9 Cir. 1957)." . . .

Upon the record before this Court no abuse of discretion by the District Court can be found. Petitioners do not contest the underlying facts with respect to their lack of diligence in prosecuting this action as found by the District Court and as set forth in the opinion of the Second Circuit Court of Appeals, as follows:

> "The case was two and one half years old when the 60-day order was entered, and three and one half years old when reopening was denied. The only action taken after the 60-day order of June 8, 1964 was the noticing of a deposition August 14, more than 60 days later, its taking October 24, 1964 and signing December 24, 1964."

In view of the facts in this case, as set forth above, the District Court would have been remiss in coming to any other result. The Circuit Court of Appeals for the Second Circuit was held in a case that was 2½ years old, that a counsel's carelessness cannot be excused if the Court is to

perform its obligations to the other litigants whose cases are necessarily delayed by such conduct. *Ohlinger* v. *United States,* 308 F. 2d 667 (2 Cir. 1962).

Petitioners have argued on page 48 of their brief that the decision in this case is in conflict with the decision of this Court in *Hill* v. *Hawes,* 320 U.S. 520 (1944). In *Hill,* the plaintiff noticed an appeal from the District Court of the District of Columbia 27 days after the judgment was entered, which was 7 days after the permissable 20 day period to appeal had expired. The Supreme Court found that the Clerk of the District Court had not given the plaintiff notice of the entry of the judgment, and it therefore gave the plaintiff an opportunity to appeal. This determination of the validity of a notice of appeal, diligently given 27 days after the entry of the judgment and *immediately* after the plaintiff became aware of the same, is easily distinguished from the case at bar where the petitioners sat on their hands for almost a full year from the date of their taking of the last pretrial deposition until the date that they moved to vacate the dismissal order. The Circuit Court, in this case, stated:

> "Even if no notices had gone out, the long delay in moving the case to trial after it had three times appeared on review calendars would justify dismissal."

In addition, petitioners have been unable to show by evidentiary proof that they have, or could have, a reasonable expectation of success in their law suit. In fact, no affidavit of merits by the petitioners has been submitted in support of their application. This Court is respectfully referred to the case of *Coclin Tobacco Co. Inc.* v. *Brown &*

Williamson Tobacco Corporation, 353 F. 2d 727 (C.C.A. 2d 1965) in which the facts are similar to ours.

The lack of diligence in prosecuting this action is clear and provides a compelling basis for the dismissal of petitioners' case. Certainly it cannot be held to have been an abuse of discretion to have denied the application to vacate the dismissal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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